



ESA

European Seed Association

ESA positions on aspects of PBR

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Overview

1. Background and context
 - Starting point – Board Decision of September 2009
 - Respective work of the ESA CIPR

2. Substantive issues
 - In the context of the evaluation
 - In some more details

3. Concluding remarks



The starting point

Decision of the ESA Board in September 2009:

- Instructs the CIPR to review the standing ESA IP position dating from 2004

Reasons for the IP position review:

- technical as well as political developments in the field of plant breeding and IP protection
- **upcoming evaluation of the EU legal framework for plant variety protection**



Work of the ESA CIPR – The process

- Information received from Commission on upcoming evaluation → priority for ESA CIPR
- CIPR had a series of meetings (17/02; 03/05; 01/07; 15/07)
- Key topics identified
- IP seminar organized in April:
 - ESA members provided their views and inputs
 - Further topics suggested – e.g. enforcement
- Position papers - as regards content - finalized by the end of the summer
- Endorsed by ESA Board in September 2010



Work of the ESA CIPR – The context

Evaluation questionnaire on the CPVR legislation received in
beginning of September

Consultation period September 1 – October 15



ESA positions on all relevant issues finalized by CIPR by the
end of the summer



Very effective and timely work done by the CIPR



Substantive issues

Topics identified and positions elaborated by ESA CIPR:

- ✓ Role of the CPVO
- ✓ Use of DNA-based markers in DUS testing
- ✓ Duration of the breeder's right
- ✓ Harvested material and directly obtained products
- ✓ Essentially derived varieties
- ✓ Protection of hybrids and access to parental lines
- ✓ Farm Saved Seed
- ✓ Enforcement of the breeder's right
- ✓ Biodiversity related issues



Substantive issues – in the evaluation context

How do these topics fit in the context of the evaluation?

Objectives of the evaluation:

1. To assess whether the CPVR regime has reached its targets
2. To identify strengths and weaknesses
3. To sense possible future challenges and identify ways to deal with them in the context of the CPVR regime



Substantive issues – in the evaluation context

Issues addressed in the survey:

1. Targets of the CPVR regime reached – general appreciation of the system (*harmonization; incentive for innovation; application procedure; performance of the Office; effectiveness of the protection; related costs*)
2. Strengths and weaknesses – questions related to substantive provisions (*scope of protection; EDVs, DUS, exemptions and derogations; term of protection; enforcement*)
3. Future challenges

 topics elaborated on by CIPR fit well with these issues



Substantive issues – some details

The role of the CPVO:

- Already addressed in the context of Better Regulation
- To be widened in respect of:
 - DUS testing → “one key several doors” principle
 - variety denominations
 - Management of the Common Catalogues



Substantive issues – some details

The use of DNA-based markers in DUS testing:

- DUS decisions based on the use of DNA-based markers *alone* in DUS testing, as a replacement for the assessment of the phenotype, are not yet considered to be acceptable
- The use of DNA-based markers is however acceptable for:
 - improving the handling and organisation of reference collections (in addition to phenotypic descriptions)
 - assessment of essential derivation
 - variety identification purposes



Substantive issues – some details

Duration of the breeder's right:

- Ongoing discussion on the term extension before CPVO regarding several crops, e.g. *asparagus*

- Procedure for term extension per crop is quite heavy



ESA would support any initiative from the CPVO aiming at a general extension of the term of protection to 30 years for all crops



Substantive issues – some details

Harvested material and directly obtained products:

- Scope of the breeder's right extends to acts in respect of harvested material under certain conditions:
 - obtained through *unauthorised use* of propagating material of the protected variety
 - unless breeder had *reasonable opportunity* to exercise *his right* in respect of propagating material
- ESA pleads for an extension of the scope of the breeder's right to directly obtained products on national and EU level



Substantive issues – some details

Essentially derived varieties:

- EDV concept is an important instrument for addressing plagiarism and ensuring a balanced and efficient protection of PBR
- list of selection methods leading to EDVs not exhaustive
- reversal of burden of proof in favour of the PBR holder
- scientific thresholds to be determined separately for each species or group of species; at a level which is not too low and reviewed regularly



Substantive issues – some details

Protection of hybrids and access to parental lines:

- Protection of a hybrid through the protection of its parental lines covers all acts - normally requiring authorization - including vegetative multiplication of the hybrid
- From UPOV 1991 no positive right can be derived that might provide for access to protected parental lines of a marketed hybrid



Substantive issues – some details

Farm saved seed:

- In principle the derogation should be abolished
- If, for overriding political reasons, maintained it should provide:
 - Sound legal basis for unambiguous information obligation for farmers and processors
 - Derogation only in species where FSS traditionally used
 - A level of fair royalty payment – 100%
 - Clarification of the concept of “own holding”
 - No exception from payment for small farmers



Substantive issues – some details

Enforcement of the breeder's right:

- Responsibility of the PBR holder
- Obstacles in effective enforcement
- ESA appreciates existing EU legal tools but asks for:
 - 1 EU court (or 1 per MS) competent for CPVR infringement cases (+ national level)
 - Expert opinions to be carried out by CPVO and acceptance of those by courts
 - Improved enforcement provisions (e.g.: Italian IP code)
 - Penalization of IP infringements - EU directive on criminal measures



Substantive issues – some details

Biodiversity related topics:

- Farmer's rights
- Disclosure of origin of the biological material in IP
 - Information on the *source* of the material (= where material was obtained from) could be provided by the applicant when known
 - Disclosure of source = administrative requirement → no pertinence on validity of IP title



Concluding remarks

- On the basis of these position papers ESA is able to provide in-depth and constructive input to the CPVR evaluation
- Hope that ESA positions and recommendations will be given due appreciation by the evaluator
- Looking forward to constructively work together with the European Commission on this important evaluation exercise



THANK YOU FOR YOUR ATTENTION!

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